Supreme Court, U.S.
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No. 99-1081

In The

Supreme Court of the United States

TOWN OF MULDROW, et al.,

Petitioners,

v.

SEQUOYAH COUNTY RURAL WATER DISTRICT NO. 7,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

Petitioners

Town of Muldrow and the Muldrow Public Works Authority. The Muldrow Public Works Authority is a public trust, of which the Town of Muldrow is the sole beneficiary. Generally speaking, singular references to "the Petitioner," "Town of Muldrow," and "Muldrow" are intended to encompass both Petitioners.

Respondent

Sequoyah County Rural Water District No. 7, referenced herein as "Sequoyah-7", is an agency and legally constituted authority of the state of Oklahoma (82 Oklahoma Statutes §1324.6), created for the purpose of developing and providing an adequate water supply to serve and meet the needs of residents within the territory of the District (Title 82 Oklahoma Statutes §1324.3).

TABLE OF CONTENTS

Page

PARTIES TO THE PROCEEDING i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

RESPONSE TO PETITIONERS' STATEMENT OF CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

RESPONSE TO STATEMENT OF THE CASE 1

ARGUMENT FOR DENYING WRIT 3

I. THE TENTH CIRCUIT'S INTERPRETATION OF § 1926(b) IS CONSISTENT WITH FEDERAL LAW 3

II. THE TENTH CIRCUIT IS ENFORCING THE PLAIN MEANING OF 1926(b) AS TO PRE-EXISTING CUSTOMERS OF A MUNICIPALITY, WHERE SUCH CUSTOMERS ARE WITHIN THE INDEBTED WATER DISTRICT'S SERVICE AREA, AND FOR WHICH THE NEWLY INDEBTED WATER DISTRICT IS MAKING SERVICE AVAILABLE 10

III. THE TENTH CIRCUIT CORRECTLY HELD THAT SEQUOYA-7 MAY RECOVER DAMAGES FOR § 1926(b) VIOLATIONS WHICH OCCURRED DURING A PRIOR LOAN 11

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Abbott Laboratories v. Portland Retail Druggists Association, 425 U.S. 1 (1975) 10

Black Crystal Coal Corp. v. Garland Coal & Mining Company, 267 F.2d 569 (10th Cir. 1959) 1, 4, 10

City of Madison, Miss. v. Bear Creek Water Ass'n, Inc., 816 F.2d 1057 (5th Cir. 1987) 7

Glenpool Utility Services v. Creek County Rural Water District, 861 F.2d 1211 (10th Cir. 1988) 7

Jennings Water, Inc. v. City of North Vernon, Inc., 682 F.Supp. 421 (S.D. Ind. 1988), *affirmed*, 895 F.2d 311 (7th Cir. 1989) 6, 9

Midstate Horticultural Co. v. Pennsylvania R.R., 320 U.S. 356, 64 S.Ct. 128, 88 L.Ed 96 (1943) 9

Moore Bayou Water Association v. Jonestown, 628 F.Supp. 1367 (M.D. Miss. 1986) 7

North Alamo Water Supply Corp. v. City of San Juan, 90 F.3d 910 (5th Cir. 1996) 4, 5, 11

Walters v. City of St. Louis, Mo., 347 U.S. 231 (1954) 1, 4, 10

Youakim v. Miller, 425 U.S. 231, 96 S.Ct. 1399 (1976) 1, 4, 10

STATUTES

7 U.S.C. §1926(b) ..... *passim*

82 O.S. §1324.3 i

82 O.S. §1324.6 i

CONSTITUTION

Art. I §8, cl. 1 1

RESPONSE TO PETITIONERS' STATEMENT OF CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Muldrow erroneously lists the U.S. Constitution, Art. I §8, cl. 1 (The Spending Clause), as being a constitutional provision involved in this case. Muldrow seeks to raise this constitutional argument for the first time within its Petition For Certiorari. However, by failing to raise this issue with the Trial Court, the Tenth Circuit on Appeal, and the Tenth Circuit within Petitioners' Motion To Reconsider, Muldrow has waived this constitutional argument. *Walters v. City of St. Louis, Mo.*, 347 U.S. 231, 745 S.Ct. 505 (1954); *Youakim v. Miller*, 425 U.S. 231, 96 S.Ct. 1399 (1976); *Black Crystal Coal Corp. v. Garland Coal & Mining Company*, 267 F.2d 569 (10th Cir. 1959).

RESPONSE TO STATEMENT OF THE CASE

Sequoyah-7 is an Oklahoma Rural Water District which is now, and has been at various times in the past, indebted to the Federal Government for loans obtained to develop its water distribution system. Sequoyah-7 brought this action seeking to enjoin Muldrow from selling water within its service area, and to recover damages for past water sales in violation of Title 7 U.S.C. §1926(b).

Title 7 U.S.C. §1926(b) [hereafter §1926(b)], states that water service provided or made available through an indebted water district may not be curtailed or limited by a municipality or other public body. As interpreted by the Courts, this provision prohibits a municipality or other

public body from selling water within the water district's service area during the period of its indebtedness.

Sequoyah-7 claims an exclusive right to sell to all water customers within its service area pursuant to Title 7 U.S.C. §1926(b). While it is true that Muldrow sold water to some of the customers in dispute for some time before this litigation was commenced, other customers were recently added to Muldrow's system. Sequoyah-7 has provided or made available water service to all the customers in dispute, and was selling water to some of the customers until Muldrow disconnected them from the Sequoyah-7 system and connected the customers to the Muldrow system.

The question of whether §1926(b) is an exception to the Federal Antitrust Statute or is somehow a violation of the Spending Clause has never been previously raised, or briefed by Muldrow. §1926(b) prohibits the limitation or curtailment of customer service that is provided or made available by the indebted water district. This restriction is not limited to curtailment or limitation which is accomplished through inclusion of the area served within the boundaries of a municipal corporation or the public body or the grant of any franchise for similar service, but includes curtailment or limitation of any form during the loan period.

Over the years Sequoyah-7 and its predecessors have received four federal loans. The original loans were taken out on April 14, 1969 and remained in place until *purchased* by Sequoyah-7 pursuant to the Agricultural Credit Act of 1987, on May 5, 1989. On September 28, 1994,

Sequoyah-7 obtained a Fourth Loan, on which it remains indebted today.

On June 12, 1998, the District Court granted summary judgment based on a finding that Sequoyah-7 had not made service available to the customers in dispute. A decision which was in error and has been reversed by the Tenth Circuit.

ARGUMENT FOR DENYING WRIT

The Court should deny Muldrow's Petition For Certiorari because Muldrow has failed to properly raise any issues of significant importance.

I. THE TENTH CIRCUIT'S INTERPRETATION OF §1926(b) IS CONSISTENT WITH FEDERAL LAW

The Tenth Circuit's determination that doubts about whether a water association is entitled to protection from competition under §1926(b) should be resolved in favor of the Federally indebted party seeking protection for its territory is an appropriate standard. Appellees seek to have this Court review the Tenth Circuit's decision based upon the *new* argument that §1926(b) is an exception to the Federal Antitrust Laws and therefore must be construed narrowly, an argument which Muldrow did not make to the Trial Court, the Tenth Circuit on appeal or to the Tenth Circuit in their Joint Petition For Rehearing. Because Muldrow failed to raise this argument in a timely

fashion and has thus waived this issue[1], the Supreme Court should deny the Petition For Certiorari[2].

Furthermore, the Tenth Circuit's holding that §1926(b) is to be broadly and liberally construed to fulfill its intended purposes is not a new revelation, but is consistent with every Court which has addressed this issue. The Courts have universally held that the purposes of §1926(b) are "(1) to encourage rural water development by expanding the number of potential users of such systems, thereby decreasing the per-user costs, and (2) to safeguard the viability and financial security of such associations (and FmHA's loans) by protecting them from the expansion of nearby cities and towns." *North Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910, 915 (5th Cir. 1996).

Section 1926(b) furthers its purposes by protecting the territory served by such associations against competitive facilities which may be developed with the expansion of municipal boundaries:

> "A new provision [section 1926(b)] has been added to assist in protecting the territory served by such an association facility against competitive facilities, which might otherwise be developed with the expansion of the boundaries of

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[1] *Walters v. City of St. Louis, Mo.*, 347 U.S. 231, 745 S.Ct. 505 (1954); *Youakim v. Miller*, 425 U.S. 231, 96 S.Ct. 1399 (1976); *Black Crystal Coal Corp. v. Garland Coal & Mining Company*, 267 F.2d 569 (10th Cir. 1959).

[2] Muldrow contends §1926(b) is an exception to the Federal Antitrust Statutes, without providing any facts or arguments to show that the Federal Antitrust Statutes would otherwise be applicable to Sequoyah-7, a state agency.

> municipal and other public bodies into an area served by the rural system.

S.Rep. No. 566, 87th Cong., 1st Sess., reprinted in 1961 U.S. Code Cong. & Admin. News 2243, 2309.

> "The service area of a federally indebted water association is ***sacrosanct***. Every Federal Court to have interpreted §1926(b) has concluded that the statute should be liberally interpreted to protect FmHA – indebted rural water association from municipal encroachment." (Emphasis added)

North Alamo Water Supply v. City of San Juan, Texas, 90 F.3d 910, 915 (5th Cir. 1996).

The Courts, which have addressed §1926(b), make it clear that the statute should be applied broadly to protect rural water associations indebted to the FmHA from competition from expanding municipal systems, whatever form the competition may take:

> "The legislative history of 7 U.S.C. § 1926(b) provides additional guidance on the scope of the statutory prohibition. Referring to 1961 revisions in the federal water loan program, the Senate Report explained:
>
> > This provision authorizes the very effective program of financing the installation and development of domestic water supplies and pipelines serving farmers and others in rural communities. By including service to other rural residents, the cost per user is reduced and the loans are more secure in addition to the community benefits of a safe and adequate supply of running household water. A new provision [section 1926(b)] has

> been added to assist in protecting the territory served by such an association facility against competitive facilities, which might otherwise be developed with the expansion of the boundaries of municipal and other public bodies into an area served by the rural system. S.Rep. No. 566, 87th Cong., 1st Sess., *reprinted in* 1961 U.S.Code Cong. & Admin. News 2243, 2309.
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> The clear message of the three federal cases applying 7 U.S.C. §1926(b) and of the Senate Report is that the statute should not be construed narrowly to prohibit municipal encroachment only if technically by annexation or grant of a franchise, but should be applied broadly to protect rural water associations indebted to the FmHA from competition from expanding municipal systems."

Jennings Water, Inc. v. City of North Vernon, Inc., 682 F.Supp. 421, 424-425 (S.D. Ind. 1988), *affirmed*, 895 F.2d 311 (7th Cir. 1989).

A municipality is simply not allowed to encroach upon the services provided by a Rural Water District ***by any means***, including condemnation:

> The statute unambiguously prohibits any curtailment or limitation of an FmHA-indebted water association's services resulting from municipal annexation or inclusion. This language indicates a congressional mandate that local governments not encroach upon the services provided by such associations, be that encroachment in the form of competing franchises, new or additional permit requirements, or similar means. To read a loophole into this absolute prohibition, as Madison would have us

> do, and allow a city to do via condemnation what it is forbidden by other means, would render nugatory the clear purpose of §1926(b).

City of Madison, Miss. v. Bear Creek Water Ass'n, Inc., 816 F.2d 1057 (5th Cir. 1987); see also *Glenpool Utility Services v. Creek County Rural Water District No. 2*, 861 F.2d 1211, 1214 (10th Cir. 1988); and *Moore Bayou Water Association, Inc. v. Town of Jonestown*, 628 F.Supp. 1367 (N.D. Miss. 1986).

In addition, §1926(b) is a statute which was enacted to protect a *"public interest,"* and statutes enacted for such purpose are to be interpreted broadly:

> The doctrine of equitable estoppel, like other principles of equity, will be applied flexibly by a federal court to achieve fairness and avoid injustice. *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 59, 104 S. Ct. 2218, 2223, 91 L. Ed. 2d 42, 51 *(1984). However, equitable estoppel cannot apply to block the application of a statute enacted to protect the public interest. Scott Paper Co. v. Marcalus Mfg. Co.*, 326 U.S. 249, 257, 66 S.Ct. 101, 105, 90 L.Ed. 47, 52 (1945).
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> * * *
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> *The Court finds that the purposes of 7 U.S.C. §1926(b) are to encourage rural water development and to safeguard the interest of the United States in having its loans repaid – both purposes aimed at promoting the public interest – rather than merely to protect the private interest of a rural water association.* See *City of Madison, Miss. v. Bear Creek Water Ass'n, Inc.*, 816 F.2d 1057, 1060 (5th Cir. 1987); S.Rep. No. 566, 87th Cong., 1st Sess., reprinted in 1961 U.S. Code Cong. & Admin. News 2243, 2309. If Jennings were estopped

from invoking the statute in this action, the result would be that North Vernon would sell water to CSL – a result that would totally violate the statutory proscription of municipal encroachment on a rural water association's service. Thus, even if CSL's allegations about Jennings' conduct are true, because as a matter of law estoppel cannot be invoked to subvert the application of a statute enacted in the public interest, CSL's motion for summary judgment must be denied.

This analysis is consistent with cases holding that a private party may not waive the operation of a statute enacted to benefit the public interest. *See Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 740, 101 S.Ct. 1437, 1445, 67 L.Ed.2d 641, 653 (1981); *Brooklyn Savings Bank v. O'Neil*, 325 U.S. 697, 704, 65 S.Ct. 895, 900-01, 89 L.Ed. 1296, 1307 (1945) (*"a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy"*); *Midstate Horticultural Co. v. Pennsylvania R.R.*, 320 U.S. 356, 360-61, 64 S.Ct. 128, 130-131, 88 L.Ed. 96, 101 (1943); *Millmaster Int'l, Inc. v. United States*, 427 F.2d 811, 814 (C.C.P.A.) ("A party may not waive a right granted to further a legislative policy in the public interest as manifested in the statute or its legislative history if the waiver would thwart the statutory purpose"), *modified*, 429 F.2d 985 (C.C.P.A. 1970). As noted above, 7 U.S.C. §1926(b) was enacted to benefit the public interest. Therefore, *just as Jennings could not have voluntarily waived the polication of the statute and authorized North Vernon to violate an act of Congress*, the same result cannot be achieved by estoppel. (Emphasis added)

Jennings Water, Inc. v. City of North Vernon, Indiana, 682 F.Supp. 421 (S.D. Ind. 1988), *affirmed*, 895 F.2d 311 (7th Cir. 1989).

In *Midstate Horticultural*, the court was addressing whether a party, by agreement, could waive a three year statute of limitation period provided by the Interstate Commerce Act. The parties, before the statute of limitation had run, entered into a formal written agreement that the Defendant would not raise the defense of statute of limitations should the parties fail to settle their disputes and litigation be subsequently brought. After the running of the statute of limitations, the Plaintiff brought suit and the Defendant asserted the statute of limitation notwithstanding their prior agreement. The Court in that case held that the agreement not to raise the statute of limitations was *"invalid as being contrary to the intent and effect of the section and the Act"*. *Midstate Horticultural Co. v. Pennsylvania R.R.*, 320 U.S. 356, 64 S.Ct. 128, at p. 130, 88 L.Ed 96 (1943).

In this case (as reflected by the *Jennings* decision) the rights provided by Title 7 U.S.C. §1926(b) are rights granted to Sequoyah-7 in the public interest and to effectuate a legislative policy to ensure repayment to the FmHA and to ensure rural water customers safe, clean water, and the statute should be read broadly to protect these interests.

Antitrust legislation is given broad interpretation (and exceptions narrow interpretation) because Antitrust legislation is *"remedial"*:

> "Because the Act is remedial, it is to be construed broadly to effectuate its purposes".

Abbott Laboratories v. Portland Retail Druggists Association, 425 U.S. 1, 12, 96 S.Ct. 1305 (1975).

§1926(b), as a "public interest" statute, is likewise *remedial* legislation, which seeks to protect the rural water districts, the customers of the districts, and Federal Government loans, as well as promoting public health and welfare by assuring an adequate, clean water supply for rural residents. §1926(b) itself must be construed broadly to effectuate its intended purposes.

II. THE TENTH CIRCUIT IS ENFORCING THE PLAIN MEANING OF § 1926(b) AS TO PRE-EXISTING CUSTOMERS OF A MUNICIPALITY, WHERE SUCH CUSTOMERS ARE WITHIN THE INDEBTED WATER DISTRICT'S SERVICE AREA, AND FOR WHICH THE NEWLY INDEBTED WATER DISTRICT IS MAKING SERVICE AVAILABLE.

Muldrow's argument that enforcement of §1926(b) violates the constitution of the United States was not raised before the District Court or the Tenth Circuit. This argument has been waived. *Walters v. City of St. Louis, Mo.,* 347 U.S. 231, 745 S.Ct. 505 (1954); *Youakim v. Miller,* 425 U.S. 231, 96 S.Ct. 1399 (1976); *Black Crystal Coal Company v. Garland Coal & Mining Company,* 267 F.2d 569 (10th Cir. 1959).

Muldrow argues that the Tenth Circuit has effected a "taking of municipality owned water-service infrastructure". This is not the case. The infrastructure remains the property of Muldrow. Muldrow simply cannot sell water

to customers within the "service area" of the water district during the period of its indebtedness[3].

§1926(b) does not create an exception to permit a city to sell water within the service area of a water district following the time the district obtains a Federal loan. The statute, with its recognized purpose of expanding the number of customers of an indebted water district, plainly states that service made available by the association "shall not be curtailed or limited, . . . during the term of such loan". If the water district has made service available to a pre-existing customer of a municipality and the customer is located within the water district service area after becoming indebted, the statute grants the indebted water district the exclusive right to sell water to that customer *during the life of the loan*. The Tenth Circuit's ruling merely references the plain reading of the statute.

III. THE TENTH CIRCUIT CORRECTLY HELD THAT SEQUOYAH-7 MAY RECOVER DAMAGES FOR §1926(b) VIOLATIONS WHICH OCCURRED DURING A PRIOR LOAN

There is no dispute that Sequoyah-7 was indebted to the FmHA for the period April 14, 1969 to May 4, 1989. Muldrow has raised the argument that when Sequoyah-7

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[3] Sequoyah-7 has requested that Muldrow forfeit its water lines constructed to sell water in violation of §1926(b). However, the case law on this subject would require Sequoyah-7 to pay the unrecouped cost of such lines. *North Alamo*, at p. 919. The Tenth Circuit did not rule on this issue, but left creation of an appropriate remedy to the District Court on remand. Petitioners' Appendix at p. 3a, footnote 3.

purchased its notes on May 4, 1989, the extinguishment of debt also extinguished Sequoyah-7's §1926(b) existing claims, prohibiting Sequoyah-7 from obtaining damages caused by Muldrow's encroachment during the period between April 14, 1969 and May 4, 1989. Muldrow's argument is unsupported by any case law or other legal principal, and should be rejected by the Court.

CONCLUSION

Based upon the arguments and authorities presented, the Petition should be denied.

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